North Dakota Law Review

Volume 29 | Number 2 Article 11

1953

Statutes - Interpretation and Construction - Electors' Authorization to Increase Tax Levy Legal Limit Where Legal Limit Subsequently Chanted by Legislature

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trustee may not obtain any advantage over the beneficiary by the slightest misrepresentation or concealment,[17] it would seem that a physician must make a full disclosure of any defects in his treatment or the patient may hold him liable on a fraud theory.

North Dakota is among the states that have provided a special statutory limitation for malpractice actions.[18] However, only two North Dakota malpractice cases have raised the statute as a defense.[19] One case was dismissed for lack of evidence,[20] and the other held that the statute of limitation was not a good defense.[21]

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STATUTES — INTERPRETATION AND CONSTRUCTION — ELECTORS' AUTHORIZATION TO INCREASE TAX LEVY PAST "LEGAL LIMIT" WHERE "LEGAL LIMIT" SUBSEQUENTLY CHANGED BY LEGISLATURE. — In the year 1946 the governing board of the Osago School District decided that the amount of money which would be raised by a levy of taxes at the rate of 22 mills — the maximum amount then permitted [1] — would be insufficient to meet the needs of the district. Following statutory procedures, the question of increasing the tax levy fifty per cent above the 22 mill limit was submitted to the electors of the district at a special election.[2] The increase was approved by the voters and the maximum tax limit was thus raised an additional eleven mills, making the total limit thirty-three mills. In 1947 the legislature amended the statute to permit school districts to levy taxes not to exceed thirty-six mills. The school district officials thereupon took the position that the permission to make an excess levy which they had received at the election was still valid, and made a levy of 50.12 mills, which was 14.12 mills in excess of the thirty-six mill limitation. Plaintiff, a taxpayer, brought an action to recover taxes paid under protest, contending that a new excess levy could not be made without a further authorization from the voters of the school district. *Held,* judgment for plaintiff. The amended statute furnished no basis to which school district officers might apply the percentage of increase voted by school districts in elections held when the prior limit of 22 mills was in effect. *Great Northern Ry. Co. v. Severson,* 50 N.W.2d 889 (N.D. 1952).

It must be conceded that if the validity of the excess tax computed on the thirty-six mill base depended on a retrospective effect [3] being given to

17. N.D. Rev. Code §59-0109 (1943).
18. See note 11 *supra.*
19. Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947) (in husband's action against surgeon for loss of wife's consortium and expenses resulting from ineffective sterilization operation, whereupon she thereafter gave birth to a child, permanently impairing her health, *held* his cause of action arose after the wife became pregnant and was not barred by limitations); Scheid v. Cavanagh, 65 N.D. 596, 260 N.W. 619 (1935) (wooden applicator left in Plantiff's nostril without discovery for three years).
20. Scheid v. Cavanagh, 65 N.D. 596, 260 N.W. 619 (1935).
21. Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947).

1. The statute in force at the time was N.D. Rev. Code §57-1514 (1943).
2. The governing statutes may be found in Chapter 57-16, N.D. Rev. Code (1943).
3. "Retrospective or retroactive laws are generally defined, from a legal view point, as those which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past." Harlan v. State, 31 Ala.App. 478, 18 So.2d 744 (1944).

the 1947 amendment, the tax was invalid because there is a presumption that amendatory statutes as well as original enactments are prospective and will not be deemed to have retroactive operation unless the legislature has expressly enunciated such an intention.[4] There was no such indication of intention in the 1947 amendment. However, it is submitted that the use of the amended statute to justify the excess levy on the thirty-six mill base did not need to be predicated on its being retroactive and that, since the authorization for the excess levy was given by electors of the district in a special election pursuant to statutory provisions and had the legal force of a local law in pari materia with the general tax statutes it should not have been considered defeated or nullified by a subsequent general statute if reasonable grounds for supporting it could be found.[5] "It is not usual," Cooley states, "to modify or take away special powers by general laws; and if it is intended to do so in any particular case, it is reasonable to suppose that the legislature would do so in unequivocal language. When this is not done the general law will be read as intending to leave the special powers in force." [6]

A review of the several statutes which are in pari materia with the amendatory statute involved in the principal case suggests that rules regarding incorporation by general reference [7] are applicable to it and might support the continuing operation of the authorization after the passage of the amendment so as to validate the levy on the thirty-six mill base. It is an established rule of interpretation that if an act is otherwise complete in itself, the adoption of provisions of existing general law regulating the subject in hand by some expression like "same as is provided by law" or "in the manner now provided by law" will be considered a general reference including not only the law in force at the date of the statute's adoption but also the law in force when the adopting law is invoked.[8] This means that such a statute will embrace all amendment and modifications of the law subsequent to the time the referring statute was enacted.[9]

It is significant that this principle has been generally followed in the application of the original statute governing mill levies by school districts.[10] This statute prescribes the maximum mill levy rate "per dollar of net assessed valuation," thus adopting by reference the basic taxable valuation of property established in §57-0228, North Dakota Revised Code of 1943,

4. Ford Motor Co. v. State, 59 N.D. 792, 231 N.W. 883 (1930); Blackemore v. Cooper, 15 N.D. 5, 106 N.W. 566 (1906).

5. Hemmer v. United States, 204 Fed. 898 (8th Cir. 1912), Reeves Co. v. Bruening, 16 N.D. 398, 114 N.W. 313 (1907).

6. 2 Cooley, Taxation §536 (4th ed. 1924).

7. "If a provision is ambiguous, it should be construed with those acts relating to the same subject matter which are enacted with it, or to which it referred, or which refer to it." Sutherland, Statutory Construction §5205 (3d ed. 1943).

8. Cole v. Donovan, 106 Mich. 692, 64 N.W. 741 (1895); George Williams College v. Village of Williams Bay, 242 Wis. 311, 7 N.W.2d 891 (1943); *cf.* Burns v. Kelley, 221 Ky. 385, 298 S.W. 987 (1927).

9. Jones v. Dexter, 8 Fla. 276 (1859) (where act provided that property in hands of executor should be distributed according to "the provisions of the law regulating descents," statute referred to any law of descent in force at the time that the right to the distribution might become vested); State *ex rel.* Miller v. Leich, 166 Ind. 680, 78 N.E. 189 (1906); Kugler's Appeal, 55 Pa. St. 123 (1867) (where act governing division of election districts provided that the proceedings "shall be the same as in the . . . alteration of the lines of townships," act included not only law in force at time of its enactment but subsequent amendments).

10. N.D. Rev. Code §57-1514 (1943).

which was fifty per cent of the actual value of the taxable property. When this latter section was amended in 1945 and the basic assessed valuation raised to seventy-five per cent,[11] the mill levy was computed on the basis of this increased percentage, and when, in 1946, the tax base was again reduced to fifty per cent by popular referendum,[12] the mill levy was computed accordingly. The reference statute adopted not only the law in force at the time it was enacted, but also the law in force when it was subsequently invoked.

It was argued by Mr. Justice Christianson, in a vigorous dissenting opinion in the principal case, that precisely the same principle was applicable in dealing with the effect of the excess levy statute and the electors' authorization to make an excess levy. The excess levy statute[13] confers upon school district authorities the power to secure approval of additional levies in the following words: "Electors of any school district may authorize in the manner provided in this chapter the levy of taxes in such school district in excess of the limitation otherwise provided by law for that purpose." Clearly this adopts as a base not only the legal mill rate existing at the time it was enacted but also the limit prescribed by the amendatory statute of 1947. Should the law be invoked subsequent to that date the authorizations would undoubtedly be for percentage increases above the mill limits set in the amendment.

The ballots on which the electors signified their approval of the excess levy were also couched in terms of general reference: "Shall Osago School District No. 58 levy taxes for the year (or years) 1946, 1947 which shall exceed the legal limit by 50%. . . . ?" Reasonably, the term "legal limit" on this ballot would refer to the mill rate in force at any time the authorization should be invoked and the fifty per cent increase would be the amount that the governing board of the district could levy in 1946 and 1947 in excess of what they would have been able to levy in these years if there were no authorization. The question in the instant case, arising from the fact that the authorization was for a two-year period and the legislature changed the mill levy rate before the levy had been made for the second year, is whether the excess levy for the first year can be computed on the basis of one legal mill rate and the levy for the first year on another. It will be recognized that the authorization itself did not constitute a tax levy. This is a separate act which the law requires be performed annually "by the governing body of each school district" and which must be "based upon an itemized budget statement which shall show the complete expenditure program of the district for the current fiscal year" expressed in dollars and cents.[14] The authorization was merely a kind of enabling act to be invoked by the governing board if it was found that the budget for a given year exceeded the amount which could be raised by the legal mill limit, the allowable excess to be determined by the actual need of the district but not to exceed fifty per cent of the mill limit.

As has been pointed out, an enactment containing a general reference operates on the law in force when the act is invoked. In the instant case, the first year the authorization was invoked and the excess tax levied the

11. N.D. Sess. L. 1945, c. 317.
12. Great Northern Ry. Co. v. Severson, 50 N.W.2d 889, 900 (N.D. 1952).
13. Chapter 57-16, N.D. Rev. Code (1943).
14. N.D. Rev. Code §57-1513 (1943).

legal limit in force was twenty-two mills; the second year it was invoked the legal limit was thirty-six mills. In applying the current legal limits, the district officials thus gave the authorization a strictly prospective operation, and the conclusion of the court that the amendment to the mill levy limitation statute was given retroactive effect seems questionable. The act which actually imposed the obligation to pay the excess levy on the amended mill rate was not performed until after the enactment of the amendment. A statute is not retroactive because it draws on antecedent facts for its operation.[15] Rather its application in this case appears, from the very language of the several related statutes, without straining the words beyond their ordinary and accepted meanings, to be part of a purely prospective implementation of the electors' authorization, which had incorporated within itself the provisions of the amendatory statute..

A brief discussion of one further aspect of the court's opinion may be worthwhile. It is a generally accepted rule, relied upon by the court in the instant case, that where the meaning of a tax statute is doubtful, the statute is to be construed strictly against the state and in favor of the taxpayer.[16] It may be pointed out, however, that care should be taken not to extend the rule so far as to destroy the real intent and meaning of the statute. In the first place, there must be a reasonable doubt concerning meaning.[17] The statutes are to be construed according to their intent [18] and words are to be given their ordinary meaning.[19] Then, if there is an apparent ambiguity or doubt, or a question of the lack of equality or uniformity in the imposition of the tax burden,[20] the doubt should be resolved in favor of the taxpayer. In the instant case, there may be a question as to whether the construction placed upon the statutes by the district officials carried into effect the intent of the electors at the time they approved the percentage increase above the "legal limit," since they may not have anticipated that the legal limit would be changed. This must be considered. It is well known, however, that the tax base can be changed by the legislature at any time,[21] and that it has been changed frequently, both as to the net taxable valuation and the mill rate, and when the electors approved the authorization of an excess levy for a period greater than one year, this contingency, it appears, could reasonably have been foreseen. The authorization itself was definite and set forth in unequivocal terms the conditions of the levy. Any doubtful meaning would appear to flow from the voters themselves, who are also the taxpayers and the beneficiaries of the tax.

15. Reynolds v. United States, 292 U.S. 443 (1934); People v. Board of Trustees of Firemen's Pension Fund, 103 Colo. 1, 82 P.2d 765 (1938); State v. Alden Mills, 202 La. 416, 12 So.2d 204 (1943).

16. National Linen Service Corp. v. State Tax Commission, 237 Ala. 360, 186 So. 478 (1939); Pappanostos v. State Tax Commission, 235 Ala. 50, 177 So. 158 (1936); see Hellerstein, State and Local Taxation — Cases and Materials 42 *et seq.* (1952).

17. "No rule . . . requires the court to raise doubts as to the meaning of an act, where, in giving words their plain and usual meaning, no doubt can possibly arise." Moran v. Lecçony Smokeless Coal Co., 122 W.Va. 405, 10 S.E.2d 578 (1940).

18. *Compare* Professor Max Radin's attack on legislature intent as a "transparent and absurd fiction," Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 870 (1930), *with* James Landis' defense, *A Note on Statutory Interpretation*," 43 Harv. L. Rev. 886 (1930).

19. Sutherland, Statutory Construction 312 (3 ed. 1943).

20. Gould v. Gould, 245 U.S. 151 (1915); National Linen Service Corp. v. State Tax Commission, 237 Ala. 360, 186 So. 478 (1939).

21. State *ex rel.* Arnot v. Flaherty, 45 N.D. 549, 178 N.W. 790 (1920).

To hold that they are in a position to challenge the validity of the tax on the ground that they did not intend what they voted for seems to be extending the rule too far.[22] "The rule that tax laws shall be construed favorably for the taxpayers is not a reason for creating or exaggerating doubts of their meaning." [23]

Moreover, it appears that adherence to the rule of strict construction is not as general as it once was, and in fact it may be suggested that there is a trend toward a less rigid rule.[24] Even the court of North Dakota, while often reiterating its allegiance to the strict rule, has sometimes taken exception to it, as in *Goldberg* v. Gray,[25] where it stated that "We do not question the rule. However, the ultimate purpose sought to be attained by the construction of any statute is to arrive at the intention of the law-making body that enacted it."

This emphasis on effectuating the intent and purpose of the legislative body bringing the law into being, whether it be a local tax law or a general state law on the same subject, is paramount. In the instant case the earlier enactments simply and clearly indicate adoption of the amended mill rate by reference, and since the legislature, in enacting the subsequent amendment, did not expressly repeal or cancel this power, and since simultaneous operation of the two acts is not impossible, it would seem that effect should have been given to the levy made pursuant to the electors' authorization. A preponderance of evidence showing a contrary intent on the part of the lawmakers, drawn from extrinsic sources, might contravert such a conclusion.

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22. "We do not pause to consider whether a statute differently conceived or framed would yield results more consonant with fairness and reason. We take this statute as we find it." Cardozo, J. in Anderson v. Wilson, 289 U.S. 20, 27 (1933).

23. Irwin v. Gavit, 268 U.S. 161 (1925) syllabus 3.

24. 2 Cooley, Taxation §505 (4th ed. 1924); 3 Sutherland, Statutory Construction 297 (3d ed. 1943); Hellerstein, *op cit. supra* note 16, at 42.

25. 70 N.D. 663, 297 N.W. 124 (1941).